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No. 88-1530

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

JOSEPH V. JULIANO,

Petitioner,

v.

COMMERCIAL LIFE INSURANCE COMPANY and AUTOMATIC DATA PROCESSING, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE CALIFORNIA SUPREME COURT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Should the United States Supreme Court grant certiorari when there remains a factual issue of whether the parties entered into a settlement agreement that resolved all of the issues in the case?

2. Does the Employee Retirement Income Security Act preempt private causes of action under California Insurance Code Section 790.03(h) for alleged improper processing of a claim under an employee benefit plan?

PARTIES TO THE PROCEEDING

1. Respondent Commercial Life Insurance Company is a wholly-owned subsidiary of Unum Corp.

2. Respondent Automatic Data Processing, Inc. has changed its name to Settlement Options, Inc., which is a wholly-owned subsidiary of CPI Group. CPI Group, in turn, is a wholly-owned subsidiary of The Continental Corp.

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RESPONDENTS' BRIEF IN OPPOSITION

Commercial Life Insurance Company and Automatic Data Processing, Inc., respondents, respectfully request that this Court deny the petition for a writ of certiorari seeking review of the decision of the California Supreme Court.

COUNTERSTATEMENT OF THE CASE

Petitioner filed a complaint in a California state court contesting the way his claims for health insurance coverage were processed by respondents. The health insurance was part of an employee benefit plan that both sides agree is covered by the Employee

Retirement Security Income Act of 1974 ("ERISA"). ERISA is a federal statute that sets forth various standards for employee benefit plans. ERISA imposes upon employee benefit plans a variety of substantive requirements relating to participation in and funding of such plans. ERISA also sets forth comprehensive civil remedies available to participants or beneficiaries for ERISA violations. *See* 29 U.S.C. § 1132(a). ERISA contains a broad preemption provision. 29 U.S.C. § 1144(a). There is an exception to preemption in the ERISA statute for laws that regulate insurance. 29 U.S.C. § 1144(b)(2)(A).

Petitioner's complaint alleged eight common law claims and one statutory claim of bad faith relating to respondents' processing of petitioner's claims for the health benefits. The eight common law claims were dismissed because they are preempted by ERISA. Petitioner does not contest the dismissal of these eight common law claims. The statutory claim was asserted pursuant to Section 790.03(h) of the California Insurance Code. Section 790.03(h) identifies certain improper insurance claim practices. Petitioner alleged that respondents violated this statute in handling petitioner's claims. Respondent filed a writ of mandamus with the California Supreme Court seeking dismissal of petitioner's claim under Section 790.03(h) as preempted by ERISA.

On December 15, 1988, the California Supreme Court determined that petitioner's private right of action under Section 790.03(h) was preempted by ERISA.[1] (A copy of the decision is attached hereto as

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[1] In 1979, the California Supreme Court had determined that Section 790.03 allowed a private right of action against an in-

Appendix A). The California Supreme Court applied this Court's 1987 decision in *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 107 S. Ct. 1549 (1987), which set forth the standard for determining ERISA preemption. In *Pilot Life*, this Court established a two-part test to determine whether ERISA preempted state claims. First, it must be determined whether the state law at issue actually regulates the business of insurance or merely relates to insurance companies. *Pilot Life*, 107 S. Ct. at 1554.[2] Petitioner does not contest the propriety of this test, only its specific application. The second part of *Pilot Life* establishes preemption of all civil claims asserting improper processing of claims for ERISA benefits even if the law is part of a state insurance regulatory scheme. This Court concluded that the civil enforcement provisions of ERISA were the exclusive means of contesting improper claims processing. *Id.* at 1555. Petitioner contests the scope of this portion of the *Pilot Life* decision as interpreted by the California Supreme Court.

The California Supreme Court's decision was based upon an application of this two-part test. First, the California Supreme Court found that Section 790.03(h)

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surance company which violated the claims practices procedures set forth in the statute. Subsequent to the filing of this case, the California Supreme Court determined that such a right of private action did not exist. Moradi-Shalal v. Fireman's Fund Ins. Cos., 758 P.2d 58 (Cal. 1988). The decision proscribed any future claims under this California statute, but allowed claims filed prior to its decision to continue.

[2] To establish whether a state law regulates or is merely related to the business of insurance, this Court reaffirmed and relied upon its earlier decision in Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724 (1985).

of the California Insurance Code was not a statute regulating the business of insurance. The court recognized that the statute had an impact upon insurance companies but did not regulate the business of insurance. Courts have consistently recognized that the "laws that have been ruled preempted are those that provide an alternative cause of action to employees to collect benefits . . . [t]hose that have not been preempted are laws of general application—often traditional exercises of state power or regulatory authority—whose effect upon ERISA plans is incidental." *Aetna Life Ins. Co. v. Borges*, 1989 U.S. App. LEXIS 2407, 2407,12-13 (2d Cir. 1989). Applying this distinction, the California Supreme Court ruled that Section 790.03(h) of the California Insurance Code did not regulate insurance by such traditional means as requiring a spreading of risk, insisting on minimal coverages, or dictating certain relationships between the insured and the insurer. As a result, the California Supreme Court held that the broad preemption under ERISA applied and that Section 790.03(h) of the California Insurance Code did not fall within the limited exception to ERISA preemption for state insurance regulations.

In addition, the California Supreme Court found preemption under the second part of this Court's decision in *Pilot Life*. Section 790.03(h) of the California Insurance Code regulated claims procedures. The California Supreme Court, applying the standards set forth in *Pilot Life*, ruled that ERISA had established the exclusive civil remedies for improper claims procedures preempting all claims for improper procedures arising under state law including Section 790.03(h) of the California Insurance Code. The court

remanded the case to allow entry of the order and to provide petitioner with an opportunity to amend the complaint to assert claims for relief under ERISA. In fact, petitioner has filed a suit asserting his ERISA claims that is now pending before a California state trial court.

After the California Supreme Court decision, but prior to filing the petition for a writ of certiorari, petitioner settled his claim. An oral agreement was reached between the parties. Specifically, petitioner made a settlement offer through his counsel which respondents accepted. The settlement was acknowledged in correspondence between counsel. (*See* Appendix B for copies of the letters.) Subsequent to that settlement, petitioner attempted to renege on the settlement agreement. As a result, petitioner recently filed this petition for a writ of certiorari and has asserted ERISA claims before the trial court in California. The settlement will be pleaded as an affirmative defense to petitioner's ERISA claims. Accordingly, petitioner will have a full opportunity to test the effects of his settlement in his current ERISA case.

SUMMARY OF ARGUMENT

1. The California Supreme Court decision is consistent with every known decision of the United States Circuit Courts of Appeals and the courts of last resort for those states that have addressed the issue of ERISA preemption since this Court's 1987 decision in *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 107 S. Ct. 1549 (1987). In fact, petitioner does not seek review because of any conflict or confusion among the circuits or states. Rather, petitioner complains only

that he is not satisfied with the consistent interpretation of ERISA preemption as set forth by this Court in *Pilot Life*. This is an inadequate justification for a granting certiorari. To the contrary, because there are no conflicts among the courts in applying the ERISA preemption, no review by certiorari is warranted.

2. The private right of action under Section 790.03(h) of the California Insurance Code no longer exists. Accordingly, review is imprudent given the lack of prospective relief and the concomitant limited impact a decision by this Court would have on future claims.

3. In light of the settlement issue, this case is not ripe for this Court's review. At a minimum, there remains a factual issue over whether the settlement reached in this matter is valid and enforceable. This factual issue is not appropriate for review upon a petition for a writ of certiorari. If determined to be enforceable, the settlement would render this appeal moot.

4. The California Supreme Court decision was correct and is supported by all applicable precedent. In fact, the United States Court of Appeals for the Ninth Circuit has found in two recent decisions that this very statute, Section 790.03(h) of the California Insurance Code, is preempted by ERISA. *Kanne v. Connecticut Gen. Life Ins. Co.*, 867 F.2d 489 (9th Cir. 1989); *Roberson v. Equitable Life Assurance Soc'y*, 1989 U.S. App. LEXIS 2024 (9th Cir. 1989), *aff'g without op.*, 661 F. Supp. 416 (C.D. Cal. 1987) (in which the district court dismissed claims under Section 790.03(h) of the California Insurance Code as preempted by ERISA).

ARGUMENT

I. THERE IS NO CONFLICT AMONG THE CIRCUITS OR STATE COURTS CONCERNING ERISA PREEMPTION

The California Supreme Court, applying this Court's ruling in 1987 in *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 107 S. Ct. 1549 (1987), held that petitioner's statutory claim under Section 790.03(h) of the California Insurance Code is preempted by ERISA. This decision is consistent with the decisions of all the federal and state appeals courts that have considered the scope of ERISA preemption under the *Pilot Life* decision. Petitioner seeks review through this petition for a writ of certiorari not because the California Supreme Court decision is inconsistent with other courts interpretation, but because he is not satisfied with the consistent application by all the appellate courts of the *Pilot Life* ruling.

The California Supreme Court specifically ruled that where state law claims concern improper processing of a claim for benefits, "Congress intended the remedies set forth in ERISA to be the *exclusive* remedies available to ERISA-plan claimants." *Commercial Life Ins. Co. v. Juliano*, No. S003129, slip op. at 17 (Cal. Dec. 15, 1988) (Appendix A at 14a). Section 790.03(h), which identifies improper claims procedures, was therefore preempted by ERISA.

Since this Court's *Pilot Life* decision in 1987, a number of courts have had an opportunity to apply that decision to preemption issues under ERISA. Specifically, several circuit courts of appeals have considered whether ERISA preempts state law claims for allegedly improperly handled claims. Following this Court's clear precedent, "[e]very court to have con-

sidered the question since *Pilot Life* was decided has reached the same conclusion." *In re Life Ins. Co. of N. Am.*, 857 F.2d 1190, 1194 (8th Cir. 1988). The circuit courts have found preemption whether the claims were asserted under state common law or state statutory law. *E.g., Amos v. Blue Cross-Blue Shield of Ala.*, 1989 U.S. App. LEXIS 3684, 3684,6 (11th Cir. 1989) (holding that "the preemptive force of ERISA is so powerful that it completely displaces state law claims."); *In re Life Ins. Co. of N. Am.*, 857 F.2d at 1194 (dismissing state common law claims and a claim under a Missouri statute that prohibited a "vexatious refusal to pay" insurance benefits); *Kanne v. Connecticut Gen. Life Ins. Co.*, 867 F.2d 489 (9th Cir. 1989) (finding the same California statute, Section 790.03(h) of the California Insurance Code, that is under review in this petition to be preempted); *Sampson v. Mutual Benefit Life Ins. Co.*, 863 F.2d 108, 110 (1st Cir. 1988) (holding that Massachusetts law is preempted by ERISA); *Anschultz v. Connecticut Gen. Life Ins. Co.*, 850 F.2d 1467 (11th Cir. 1988) (finding that Florida common law and statutory claim for improper claim processing preemption ERISA).

Similarly, the courts of final appeal in those states that have considered preemption have all ruled that state claims arising out of the processing of insurance claims of ERISA programs are preempted. *E.g., Hood v. Prudential Ins. Co.*, 522 So.2d 265 (Ala. 1988) (affirming lower court's ruling that ERISA preempted Alabama claims for bad faith refusal to pay an insurance claim); *Desmarais v. Joy Mfg. Co.*, 538 A.2d 1218 (N.H. 1988) (holding that ERISA preempts claims under New Hampshire Common Law). The Cal-

ifornia Supreme Court's decision in this case is consistent with the decision of other courts.

The California Supreme Court decision in this case is also supported by two recent decisions of the United States Court of Appeals for the Ninth Circuit's finding preemption of the very same State of California statutes. *Kanne v. Connecticut Gen. Life Ins. Co.*, 867 F.2d 489 (9th Cir. 1989) and *Roberson v. Equitable Life Assurance Soc'y*, 1989 U.S. App. LEXIS 2024 (9th Cir. 1989), *aff'g without op.*, 661 F. Supp. 416 (C.D. Cal. 1987). In both cases, the court ruled that private causes of action under Section 790.03(h) of the California Insurance Code are preempted by ERISA.

The consistency of the decisions indicates that grant of certiorari and review of this case would serve little purpose. This Court's decisions concerning preemption of ERISA, as set down in *Pilot Life*, provide clear guidance to the lower courts. As the Eighth Circuit articulated in *In re Life Ins. Co. of N. Am.*, 857 F.2d 1190, 1194, "the Court in *Pilot Life* could not have stated with any greater clarity that the remedies afforded under ERISA are exclusive, and no state law purporting to supply additional remedies will escape the preemptive effect of § 44(a) as laws 'which regulate insurance' under [ERISA]." This clarity is attested to by the consistency among the circuit and state courts in applying the holding in *Pilot Life*. Absent the need to clarify or deal with the conflicts, certiorari should not be granted. *See Hoo v. United States*, ___ U.S. ___, 108 S. Ct. 742 (1988).

II. THE CALIFORNIA SUPREME COURT DECISION HAS LITTLE IMPACT ON FUTURE CLAIMS

Certiorari is inappropriate here because the decision in this case will have minimal impact. This case deals with preemption of a private right of action under Section 790.03(h) of the California Insurance Code. The California Supreme Court has ruled that Section 790.03(h) does not provide a private right of action. In overruling an earlier precedent, the California Supreme Court, in *Moradi-Shalal v. Fireman's Fund Ins. Cos.*, 758 P.2d 58 (Cal. 1988), abolished any private right of action under California Insurance Code Section 790.03(h). The court held that its decision applied only to cases filed subsequent to the decision, allowing claims filed prior to the date of the *Moradi-Shalal* decision, August 18, 1988, to go forward.

As a result, the issue of preemption of Section 790.03(h) of the California Insurance Code is now moot for all future claims. A decision by this Court would have a direct effect only on those few cases filed before August 18, 1988 that are and will continue to be pending. If this Court were to grant certiorari in the present case, the impact would extend little beyond the petitioner himself. Such limited precedential value provides further reason why this Court should not grant certiorari. *See Coleman v. Balkcom*, 451 U.S. 949, 956 (1981) ("The questions presented in the petition are of importance only to petitioner himself and therefore are not suitable candidates for the exercise of our discretionary jurisdiction.") (Rehnquist, J., dissenting).

III. THE CASE IS NOT RIPE IN LIGHT OF THE ALLEGED SETTLEMENT OF ALL OF THE CLAIMS

At a minimum, there is a factual dispute over whether all of the claims that gave rise to petitioner's cause of action have been settled. Prior to filing the petition for a writ of certiorari, an oral settlement was reached between the counsel to the parties. Subsequent to that settlement, petitioner reneged on the settlement, sought this writ of certiorari, and pursued his ERISA claims arising out of the same facts that gave rise to the claim now before this Court. (*See* Appendix B for correspondence concerning the settlement.) The effects of the settlement upon petitioner's claim will be fully adjudicated by the California trial court. The settlement is an affirmative defense which will be raised by the respondents when their answer is due in that matter.

If this settlement is held to be valid and enforceable, all of petitioner's claims, including his claims for which he now seeks review by this Court, will be resolved, and the issues before this Court rendered moot. Certiorari should be denied where a settlement rendered petitioner's claim moot. *E.g.*, *Hammond Clock Co. v. Schiff*, 293 U.S. 529, 530 (1934) (*per curiam*); *United States v. Alaska*, 253 U.S. 113, 116 (1920). At a minimum, this settlement issue raises significant factual questions that preclude granting certiorari. *See United States v. Johnston*, 268 U.S. 220, 227 (1925) (ruling that the Supreme Court does "not grant a certiorari to review evidence and discuss specific facts.").

IV. THE CALIFORNIA SUPREME COURT'S DECISION IS SUPPORTED BY ALL KNOWN PRECEDENT

The California Supreme Court's decision in this case is correct and is supported by all available precedent. Two recent decisions of the United States Court of Appeals for the Ninth Circuit held that the same statute, Section 790.03(h) of the California Insurance Code, is preempted by ERISA. In a decision rendered prior to the California Supreme Court's decision at issue here, the United States Court of Appeals for the Ninth Circuit held that ERISA preempted a cause of action concerning improper claims processing under Section 790.03(h) of the California Insurance Code. *Kanne v. Connecticut Gen. Life Ins. Co.*, 867 F.2d 489 (9th Cir. 1989). The court in *Kanne* specifically held that:

> [T]he Court [in *Pilot Life*] made abundantly clear that its preemption holding was equally based on its acceptance of the Solicitor General's view that "Congress clearly expressed an intent that the civil enforcement provisions of ERISA § 502(a) be the exclusive vehicle for actions by ERISA-plan participants and beneficiaries asserting improper processing a claim for benefits."

Id. at 494 (citing *Pilot Life*, 107 S. Ct. at 1555). The Ninth Circuit concluded that "under *Pilot Life* we find the conclusion inescapable that § 790.03(h) is preempted by ERISA." *Id.* at 493. In a ruling rendered after the California Supreme Court's decision here, *Roberson v. Equitable Life Assurance Soc'y*, 1989 U.S. App. LEXIS 2024 (9th Cir. 1989), *aff'g without op.*, 661 F. Supp. 416 (C.D. Cal. 1987), the United States Court of Appeals for the Ninth Circuit affirmed without opinion the district court's holding that Section 790.03(h) of the California Insurance Code is preempted by ERISA.

The California Supreme Court's decision is also supported by the United States Solicitor of Labor, who filed an *amicus curiae* brief before the United States Court of Appeals for the Ninth Circuit in the *Kanne* case. In that brief, the Solicitor supported the position that Section 790.03(h) of the California Insurance Code was preempted by ERISA. (A copy of the brief is attached hereto as Appendix C.)

As a result, the substantive decision of the California Supreme Court is consistent with this Court's decision in *Pilot Life*. That decision is supported by decisions of the United States Court of Appeals for the Ninth Circuit dealing with the very same statute and by decisions of other Circuit Courts of Appeals and state courts that have addressed the issue. No further review is warranted.

CONCLUSION

For the foregoing reasons, respondents respectfully request that the petition for a writ of certiorari be denied.

Dated: April 14, 1989
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